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September 1, 2016

ADVISORY OPINION NO. 2016-24

Mr. B.K. "Skipper" Goodwin, III
Chairman, Friends of McCalla, Inc.
1630 4th Avenue, North
Bessemer, Alabama 35020

Public Officials Soliciting Lobbyists And/Or
Principals For Contributions To 501(c)(3)
Nonprofit Organization

Public officials and employees and their families are permitted to solicit donations to Friends of McCalla from principals as long as the purpose for doing so is to benefit the public and funds raised will not provide any personal benefit to the public official, public employee, their family or a business with which they are associated as noted herein.

As we have stated in prior Advisory Opinions, public officials and employees are not permitted to solicit donations from individuals or entities that "have matters pending before them" even when the funds raised will not provide any benefit to that public official or employee. This restriction is in place because of the risk of the donation influencing official action.

The Commission cannot give any practical guidance on how public officials and employees should identify such individuals or entities beyond what the Commission has already stated previously which is that those people covered by the Act should review the list of those who will be solicited.

If a public official or employee solicits in violation of the Act and money is received pursuant to that solicitation, then the donation must be returned.

A public official or employee, or their family, who is employed by the nonprofit, is on the Board and paid for Board service, or derives any other personal gain from Board service may not solicit on the nonprofit's behalf.

A public official/public employee may not solicit a lobbyist for anything other than a campaign contribution.

A lobbyist or a principal may on their own contribute to a charitable purpose, provided an improper solicitation has not been made.

Dear Mr. Goodwin:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission, and this opinion is rendered pursuant to that request.

QUESTIONS PRESENTED

1. Are public officials and employees permitted to solicit donations to Friends of McCalla from principals when the funds raised will not provide any personal financial benefit to the public official or employee? Is the answer different if the public official or employee serves on the Friends of McCalla Board of Directors (as this may be a scenario they address in the future)?

2. Are "family members" of public officials and employees (as defined in the Ethics Act) permitted to solicit donations to Friends of McCalla from principals?
3. Are public officials and employees permitted to solicit donations to Friends of McCalla from individuals or entities that "have matters pending before them" when the funds raised will not provide any personal financial benefit to that public official or employee? If not, can the Commission provide any practical guidance on how public officials and employees should identify such individuals or entities before signing general fundraising request letters when they may not be aware of all agenda matters they will confront?
4. If the answer to any of the questions above is negative but Friends of McCalla receives a donation that it learns followed a public official or employee solicitation to such a Commission-determined prohibited source (*i.e.*, a principal or person / entity with a matter pending before the public official or employee) must Friends of McCalla return that donation to the donor?
5. Is the result of the above questions different if the fundraising solicitation would ultimately support a government entity (not a charity)? For example, if the facilities being constructed by Friends of McCalla were going to be ultimately transferred to a governmental body for their caretaking (such as a local park board) would a public official or employee be permitted to raise funds for Friends of McCalla from the sources referenced in the above questions?
6. Is the Friends of McCalla letterhead, brochures, or website used in fundraising permitted to include the names and public positions of any public officials or employees who are Friends of McCalla supporters or potentially board members?

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

Friends of McCalla, Inc. is a 501(c)(3) charitable organization that was established by concerned citizens and business leaders in the McCalla area. The purpose of Friends of McCalla is to raise funds to construct and develop recreation/athletic facilities which include the McCalla Youth Athletic Sports Complex.

In order to build these facilities, Friends of McCalla must raise funds from individuals, businesses, and other community organizations. They would like to send fundraising letters on their letterhead requesting financial support from individuals and businesses with an interest in

the community. Some supporters who would be interested in participating in fundraising activities for Friends of McCalla are public officials and employees.

Some potential donors are principals under the Ethics Act. Any such letter sent on behalf of Friends of McCalla would include an appropriate disclaimer regarding inadvertent lobbyist solicitations. Friends of McCalla states as well that certain public officials or employees may arrange some in-person meetings regarding fundraising for the organization.

The applicable Code sections are Ala. Code §§ 36-25-1(34), 36-25-5, 36-25-5.1, 36-25-7 and 36-25-23(c). Ala. Code § 36-25-1(34) defines "thing of value" to include items of monetary value. Ala. Code § 36-25-5(a) prohibits public officials and public employees from using their official position to obtain personal gain. Ala. Code § 36-25-5.1 states public officials and public employees cannot solicit or receive a "thing of value" from a lobbyist, subordinate of a lobbyist, or principal (and these three groups cannot offer or provide them either). Ala. Code § 36-25-7 prohibits anything, regardless of whether or not it is a thing of value, from being offered or solicited in an effort to corruptly influence official action. Finally, Ala. Code § 36-25-23(c) prohibits a public official or public employee from soliciting anything at all from a lobbyist, except a campaign contribution.

The questions asked require the Commission to define, first, who a "principal" is.¹ While never addressed through a formal Advisory Opinion, the Commission has informally advised that the term "principal" should be defined as we do here. Ala. Code § 36-25-1(24) defines a principal as, "A person or business which employs, hires, or otherwise retains a lobbyist. A principal is not a lobbyist but is not allowed to give a thing of value."

A corporation or association employing a lobbyist is a principal, as is any "person" (defined as "[a] business, individual, corporation, partnership, union, association, firm, committee, club or other organization or group of persons." Ala. Code § 36-25-1(25)). Corporations, Associations, and other legal entities can only act through individuals or groups of individuals. Corporations operate under the authority of their Boards of Directors subject to limitations set out in their Articles of Incorporation. Ala. Code 10A-2-8.01. Officers' duties are set forth in the Corporation's By-laws and through the actions of the Board. Ala. Code § 10A-2-8.41. Nonprofit entities, likewise, operate through the actions of their Boards of Directors except as may be modified in their Certificates of Formation. Ala. Code § 10A-3-2.08.

¹ The Commission received several requests for Advisory Opinions which involved the same issues as asked in this Opinion. The Alabama Association of Nonprofits specifically asks us to define the term "principal" for the members of their Association. The Commission addresses in this Opinion that specific question which is relevant, as well, to the Friends of McCalla's request.

Accordingly, the Ethics Act's definition of "principal" is broad. It applies not just to the "business" that employs a lobbyist, but also to the "persons" who, in their association with the business, employ, retain, or direct a lobbyist. Those persons include people who occupy top-level, decision-making positions within the business. In addition to these individuals, principals include those at the executive level who, through their position, influence, or discretionary authority are responsible for the lobbyist's compensation or actions on behalf of the business or organization or who can otherwise act on the corporation's behalf. Members of the Board of Directors, officers, and related individuals who have authority are principals.

While all employees of an entity are not principals, the individuals described above are. Members of an Association who have no authority within the Association, and are otherwise not within the proscriptions stated above, are not considered principals. The exact application of the definition will depend on the circumstances, such as the structure of the business or the activities of the persons acting on behalf of the business, and the limitations placed on their authority through, for example, the formation documents.

The issues presented here are whether the Friends of McCalla can solicit or receive contributions from principals even if they serve on the Board for Friends of McCalla, whether family members of public officials can solicit for Friends of McCalla, whether public officials can solicit donations for Friends of McCalla from those who have business before them, and whether the analysis changes if the ultimate beneficiary of their actions is a governmental entity. This Opinion is limited to these specific questions.

The designation "nonprofit" no longer means only a traditional charity. Charities which benefit the poor and disadvantaged, which provide for the cure or treatment of a particular illness or disease, or benefit the public generally through cultural and educational programs such as museums and libraries should be able to benefit from the efforts of public officials and employees who raise money on their behalf. This use of office for the public good is an extension of, and consistent with, the official's public role. The beneficiary of those solicitations, however, must be the public.

Turning to the questions asked, if a public official or employee solicits a donation from a principal for a non-profit organization, then the question is: "does the public official or employee, their family, or a business with which they are associated benefit from that donation?"

Ala. Code § 36-25-23(c) prohibits a public official or public employee from soliciting anything at all from a lobbyist, other than a campaign contribution. The Code's blanket prohibition on lobbyist solicitations indicates that public officials, employees, or groups thereof may, under certain limited circumstances, solicit or receive contributions from principals. The

issue presented here implicates one of those limited circumstances: whether public officials can solicit from principals contributions to a nonprofit charity, even if they are members of the Board of Directors of the charity, when the charity benefits the public and does not benefit the public official or employee, his or her family, or a business with which they are associated.

The Commission has addressed the issue of public officials and public employees making solicitations for various causes on numerous occasions, and the Commission has consistently held that public officials cannot solicit contributions if doing so results in personal gain to the public official or employee or if it involves soliciting from a lobbyist. They can solicit for traditional charities, however, as long as certain guidelines are followed.

In Advisory Opinion No. 96-57 the Commission held:

"Members of the Alabama State Employees Association, Third Division Transportation Chapter may solicit a thing of value from a person or business with whom they do not directly inspect, regulate, or supervise in their official capacity when the solicitation is done for a nonprofit organization, where there is no personal gain to the public employee, and no influencing of official action. Members of the Alabama State Employees Association, Third Division Transportation Chapter may not solicit a thing of value from a vendor who does business with the Department of Transportation that they directly inspect, regulate, or supervise."

The same conclusion was reached in Advisory Opinion No. 96-101, which held:

"Members of the State Capitol Police may solicit a thing of value from a person or business with whom they do not directly inspect, regulate, or supervise in their official capacity, when the solicitation is done for a nonprofit organization where there is no personal gain to the public employee and no influencing of official action."

The Commission issued Advisory Opinion No. 97-19 which held:

"Members of the Alabama Legislature may solicit sponsors and sell tickets to a political party reception for members of that party; provided, they shall not solicit any lobbyists to give anything whether or not the thing solicited is a thing of value for any purpose other than a campaign contribution; and provided further, that they not use their position as a Legislator to influence or attempt to influence the giving of donations. Likewise, it would be improper for a member of the Legislature to solicit a thing of value from an individual or group who had legislation pending before the Legislature."

In Advisory Opinion No. 97-59 the Commission stated, "[A] public official [cannot] solicit anything, regardless of whether or not the item solicited was a thing of value from a lobbyist, other than a campaign contribution."

Advisory Opinion No. 2011-11 involved charitable organizations or nonprofit organizations that the public official was in some way associated with, or supported, but for whom he was not an employee. The Commission held, "Lobbyists and principals may contribute to any charitable or nonprofit organization that they so desire, regardless of whether or not public officials/public employees volunteer for the organization or serve on its board. A public official/public employee may not solicit a lobbyist to contribute to a charitable or non-profit organization."

The Commission continued, "Public officials and public employees may, on behalf of a charitable organization, sign a solicitation letter; provided, the solicitation letter is generic and is done in such a manner that individuals or entities receiving the solicitation do not feel obligated to contribute. Public officials and public employees may not, even on behalf of a charitable Organization, solicit anything except a campaign contribution from a lobbyist."

In that same opinion the Commission stated, "Public officials and public employees may not exert undue influence over persons or principals to contribute to a charitable organization, when those individuals solicited have matters pending before the public body on which the public official serves or the public employee is employed."

The Commission has stated in several opinions that any solicitation list should be properly vetted to determine whether lobbyists appear on the list, and if they do, remove them accordingly. It has advised, as well, that letters should contain a disclaimer that states that if the letter is received by a lobbyist it was improperly sent to them and they should, therefore, disregard the letter. Friends of McCalla states that any solicitation letter will include this disclaimer.

The Ethics Act prohibits public officials and employees from both soliciting and receiving a thing of value from a lobbyist, subordinate of a lobbyist or a principal. The purpose for which the Friends of McCalla was formed was to benefit the public, the McCalla citizenry. As long as that is, in fact, the case and the public official or employee who solicits receives no personal gain from any solicitation, and neither does a member of their family or a business with which they are associated (except as stated herein), and as long as nothing is solicited or received for the purpose of corruptly influencing official action, then our past recommendations, guidelines and restrictions on this issue continue to apply. That analysis includes, however, that no public official or public employee can solicit lobbyists for anything other than a campaign contribution.

The Code defines Business as, "Any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, or **any other legal entity.**" Ala. Code § 36-25-1(1) (emphasis added). It defines Business With Which The Person Is Associated as, "Any business of which the person or a member of his or her family is an officer, owner, partner, **board of director member**, employee, or holder of more than five percent of the fair market value of the business." Ala. Code § 36-25-1(2) (emphasis added). Ala. Code § 36-25-5(a) states,

"No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Likewise, Ala. Code § 36-25-7(a) prohibits the solicitation or receipt of anything, whether a "thing of value" or not for the purpose of corruptly influencing official action.

The Commission has stated in the past that nonprofits on whose boards a public official or employee sits are businesses with which they are associated, and the Code's language supports that conclusion. The Code's prohibitions, however, only make sense when applied to circumstances where the public official or employee receives personal gain from either their Board service or the solicitation itself, where the solicitation or donation is solicited or received for the purpose of corruptly influencing official action, or when it is solicited in clear violation of 23(c). Therefore, if the public official or employee, or their family, is employed by the nonprofit or is paid for Board service, or derives any other personal gain from service, then they may not solicit on the nonprofit's behalf. Otherwise, they may although they may never solicit anything from a lobbyist except a campaign contribution.

The Friends of McCalla has raised these questions in part because of Advisory Opinion No. 2015-14. That Opinion addressed the issue of whether a legislator could solicit contributions from lobbyists or principals on behalf of a nonprofit organization for whom she was an employee. Allowing that solicitation to occur under those facts would have put this public official in the position of soliciting money from principals for a business with which she was associated in violation of Ala. Code § 36-25-5(a)'s prohibitions. It would be a violation of Section 36-25-5.1(a), as well, since that section prohibits her from soliciting a thing of value from a lobbyist or principal. Outside of the facts of that opinion, our analysis on this fundraising issue remains largely unchanged except as noted herein.

CONCLUSION

Public officials and employees and their families are permitted to solicit donations to Friends of McCalla from principals as long as the purpose for doing so is to benefit the public, and as long as funds raised will not provide any personal gain to the public official, public employee, their family or a business with which they are associated as noted herein. If they are members of the Board, they may solicit on Friends of McCalla's behalf unless they are paid for Board service or derive any other personal gain from service.

As we have stated in prior Advisory Opinions, public officials and employees are not permitted to solicit donations from individuals or entities that "have matters pending before them" even when the funds raised will not provide any benefit to that public official or employee. This restriction is in place because of the risk of the donation influencing official action. The Commission cannot give any practical guidance on how public officials and employees should identify such individuals or entities beyond what the Commission has already stated previously which is that those people covered by the Act should review the list of those who will be solicited.

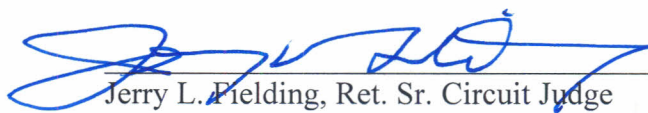
A public official or employee, or their family, who is employed by the nonprofit, is on the Board and paid for Board service, or derives any other personal gain from service may not solicit on the nonprofit's behalf.

If a public official or employee solicits in violation of the Act and money is received pursuant to that solicitation, then the donation must be returned. A lobbyist or a principal may on their own contribute to a charitable cause, provided an improper solicitation has not been made.

The effective date of this Opinion is delayed for 30 days to allow for a period of public comment, after which time the Commission may modify the Opinion or confirm it in its present form.

AUTHORITY

By5-0 vote of the Alabama Ethics Commission on September 1, 2016.


Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair, Alabama Ethics Commission